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3 **BEFORE THE SHORELINES HEARINGS BOARD**  
4 **STATE OF WASHINGTON**

5 **SAVE OUR SHAW,** )  
6 )  
7 **Appellant,** ) **SHB NO. 94-62**  
8 )  
9 **v.** ) **ORDER ON MOTIONS FOR**  
10 ) **SUMMARY JUDGMENT**  
11 **SAN JUAN COUNTY and RICHARD** )  
12 **and SARA KAUFMAN,** )  
13 )  
14 **Respondents.** )  
15 \_\_\_\_\_ )

16 This matter comes before the Board on cross motions for summary judgment  
17 The Board was comprised of Richard C Kelley, James A Tupper, Jr , presiding, and  
18 Robert Hinton The Board and reviewed and considered the following pleadings filed in  
19 support and in opposition to the motions for summary judgment together with all and  
20 documents, declarations and exhibits incorporated therein

21 1 Save Our Shaw's Motion for Summary Judgment  
22 2 Respondent Kaufman's Response to Appellant's Motion for Summary  
23 Judgment  
24 3 Save Our Shaw's Reply on Its Motion for Summary Judgment  
25 4 Corrected respondent Kaufman's Motion for Summary Judgment or in the  
26 Alternative for Partial Summary Judgment

27 **ORDER ON MOTIONS FOR**  
**SUMMARY JUDGMENT**  
**SHB NO 94-62**

5 Affidavit of Counsel of Respondent Kaufman in Support of Its Motion for  
1 Summary Judgment or in the Alternative for Partial Summary Judgment

2 6 Respondent San Juan County's Memorandum in Support of Dismissal of  
3 Appellant's Motion for Summary Judgment

4 7 Save Our Shaw's Response to Respondent Kaufman's Motion for  
5 Summary Judgment or in the Alternative for Partial Summary Judgment

6 8 Respondent Kaufman's rebuttal of S O S 's Response to Kaufman's  
7 Motion for Summary Judgment

9 FACTUAL BACKGROUND

10 The following facts are undisputed by the parties Richard Kaufman and his wife  
11 own a parcel of land known as Lot 3 within the Sea Otter short plat subdivision approved  
12 by San Juan County in 1980 The Kaufman property is located near the entrance to Post  
13 Office Bay on the southwest shore of Shaw Island On May 25, 1993, the Kaufman's  
14 applied for a shoreline substantial development permit to construct a single user dock  
15 including a staircase to access the dock from their residence As approved by the county  
16 on May 16, 1994, the permit for this proposal contained the following condition  
17 regarding joint-use of the dock  
18

19  
20 The present or future owners of the subject parcel are required to consider  
21 joint use of the dock if the present or future owners of lot #26322007 (as  
22 of 3/21/94) so desire, subject to reasonable terms of use, access and cost  
23 sharing  
24  
25  
26

1 Tax lot no 2632207 is Lot 4 of the Sea Otter subdivision It is located to the  
2 north of the Kaufman property The owners of that parcel currently have a float in Post  
3 Office Bay

4 Save Our Shaw is a Washington nonprofit corporation Lynn Squires is president  
5 of the organization and a resident of Shaw Island Ms Squires appeared and appealed a  
6 determination of non-significance issued by the county for the permit application under  
7 RCW 42 21C 030 and WAC 197-11-310

### 8 DISCUSSION

9 Save Our Shaw seeks summary judgment on Issue No 7(b) of the Prehearing  
10 Order as to the applicability of San Juan County Shoreline Master Program ("SJCSMP")  
11 regulations regarding dock permits in subdivisions to the Kaufman permit The  
12 regulation at issue, SJCSMP 16 40 508, General regulation No 8, which was adopted in  
13 1976 provides  
14

15 All waterfront subdivisions approved after adoption of this Master  
16 Program shall include or provide for construction of a single, joint use  
17 moorage facility by the lot owners, at their option, in a designated,  
18 reserved area of the waterfront, provided that subdivisions located where it  
19 would be physically impossible to construct such a facility shall be exempt  
20 from this provision Individual docks and piers shall be prohibited,  
provided that the county may authorize more than one moorage facility if a  
single facility would inappropriate or undesirable given the specific site  
and marine conditions

21 SJCSMP 16 40 1204 further restricts the ability of transferees holding property  
22 within subdivisions subject to General Regulation No 8 as follows  
23

24 No building permit, septic tank permit, or other development permit shall  
25 be issued for any parcel of land developed or divided in violation of this  
26 Master Program or of local division regulations The prohibition in this

section shall not apply to an innocent purchaser for value without actual notice

1           The issuance of a permit for a single use dock to the Kaufmans was in violation of  
2 these provisions of the local master program. The Sea Otter subdivision was approved  
3 after the enactment of General Regulation No. 8 which prohibits such permits. The joint  
4 use condition attached to the Kaufman permit does not cure this defect because it only  
5 requires the Kaufmans to consider joint use opportunities. This non-binding condition  
6 does not overcome the prohibition of individual use docks and piers under the subject  
7 regulation.  
8

9           The Kaufmans respond that the regulation should not be applied to them in this  
10 manner because San Juan County has not imposed a mandatory joint use requirement on  
11 other dock permits on Shaw Island and within the Sea Otter subdivision. This Board is  
12 not bound, however, to prior inconsistent actions or interpretations of the master program  
13 by the county. The position of the Board in this regard was recently upheld in Buechel v.  
14 Department of Ecology, 125 Wn 2d 196, 210-11 (1994), where the Court stated, "The  
15 proper action on a land use decision cannot be foreclosed because of a possible past error  
16 in another case involving different property." See Mercer Island v. Steinmann, 9 Wn  
17 App 479, 483 (1973). General Regulation No. 8 is clear on its face that individual user  
18 docks are prohibited unless the applicant meets one of the exemptions set forth therein or  
19 in SJCSMP 16.40.1204.  
20  
21  
22

23           The Kaufmans also assert that they are innocent purchasers for value that did not  
24 have actual notice of General Regulation No. 8 at the time that they acquired their  
25

property. If so, they would be exempt from General Regulation No. 8 pursuant to  
1 SJCSMP 16.40.1204. The Kaufmans have not established a genuine issue of fact as to  
2 this exemption. On summary judgment the non-moving party must establish a genuine  
3 issue by setting forth specific facts that would be admissible as evidence. CR 56.  
4 Argumentative assertions, as presented by the Kaufmans here, are insufficient to meet  
5 this requirement. Grimwood v. University of Puget Sound, 110 Wn.2d 355, 359-60  
6 (1988).  
7

8 The burden of proof to establish entitlement to an exemption to the general  
9 regulation rests with the Kaufmans. The claim to the benefit of an exemption in this case  
10 is no different than the assertion of an affirmative defense where the burden of proof rests  
11 with the party asserting the defense. Olplinski v. Clement, 73 Wn.2d 944 (1968), In re  
12 Watkins, 42 Wn. App. 371, review denied (1985). Inasmuch as the respondents have not  
13 come forward with any sworn testimony or other admissible evidence that would  
14 demonstrate that the Kaufmans are innocent purchasers without actual notice of the  
15 general regulation there is no genuine issue of material fact to support denial of summary  
16 judgment to the appellants.  
17  
18

19 We accordingly grant summary judgment to appellants on Issue No. 7(b) of the  
20 Prehearing Order. The Board will remand this matter to San Juan County and allow the  
21 permit to be issued provided that it is conditioned on a mandatory joint use option for the  
22 owners or successors in interest of Lot 4 as described above and in condition no. 9 to the  
23 permit on appeal. The mandatory requirement should include a joint use agreement that  
24 provides reasonable terms of use, access and cost sharing. If agreement cannot be  
25

reached, the condition should remain mandatory. In either case, reasonable access should be considered to include access to the joint use facility by land. DeMuth v. San Juan County, SHB No. 89-63 (1990).

Save Our Shaw states in its motion that withdraws the remainder of its appeal in the event summary judgment is granted on the foregoing issue. In light of the foregoing decision, Issues No. 1, 6, 7(a), (c)-(e), and 8(a)-(d) shall be deemed waived and dismissed. The only remaining issues in this appeal are those raised by the Kaufmans dealing with standing and other procedural matters. Standing under RCW 90 58 180 is jurisdiction and addressed by both parties in their respective motions. Summary judgment shall be granted to appellants on the issue of standing and authority to maintain this appeal. An association or nonprofit corporation has standing to appeal an administrative decision providing any one of its members has standing for an appeal. Save A Valuable Environment, 89 Wn 2d 862, 867 (1978). The appellant here has raised legitimate issues under the Shoreline Management Act and have thereby established that they are an aggrieved party within the meaning of RCW 90 58 180. Washington Environmental Council v. Whatcom County, SHB No. 93-68, Order Denying Motion for Partial Summary Judgment, (1994). There is no issue that officers of Save Our Shaw have acted within their authority to bring this appeal. Issues No. 2 and 4 of the Prehearing Order shall therefore be dismissed.

The Kaufmans have raised a procedural issue as to whether necessary parties have been joined in this appeal. In this matter the Board has jurisdiction related solely to the Kaufman permit. Other than the appellant, applicants and county there are no necessary

1 parties to the appeal and Issue No. 4 of the Prehearing Order shall be dismissed. The  
2 final issue raised by the Kaufmans is the appellant's compliance with procedural rules of  
3 the Board. We find no basis for this assertion, and therefore dismiss Issue No. 5 of the  
4 prehearing order. There being no other issues presented by the parties, this case shall be  
5 dismissed in accordance with the following

6 ORDER

7 IT IS HEREBY ORDERED that summary judgment is granted appellant as to  
8 applicability of SJCSMP 16.40.508, General Regulation No. 8, and that this appeal is  
9 DISMISSED and REMANDED to San Juan County,

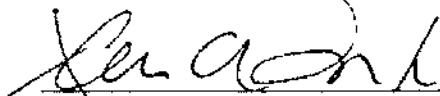
10 IT IS FURTHER ORDERED that San Juan County may issue the subject permit  
11 to the Kaufmans provided that the permit is conditioned on a mandatory joint use  
12 requirement that will allow reasonable terms of use, access and cost sharing. Reasonable  
13 use shall include access by land to the joint use facility,  
14

15 IT IS FURTHER ORDERED that all other issues in the Prehearing Order are  
16 DISMISSED with prejudice, and  
17

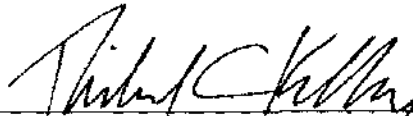
18 IT IS FURTHER ORDERED that the final hearing in this matter scheduled for  
19 February 6, 1995, is hereby canceled  
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DONE this 18<sup>th</sup> day of January, 1995

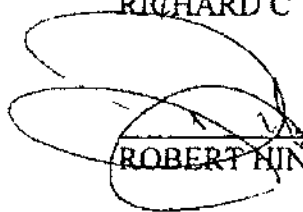
SHORELINES HEARINGS BOARD



JAMES A. TUPPER, JR., Presiding



RICHARD C. KELLEY, Member



ROBERT HINTON, Member

S94-620

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